

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ERNEST GILLIAM JR.,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

) Case No. DISM-01-0007

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, RENÉ EWING, Member. The hearing was held at Western State Hospital, Hearings Conference Room, Steilacoom, Washington, on March 25 and 26, 2002. WALTER T. HUBBARD, Chair, reviewed the record in the matter and participated in the decision in this matter. GERALD L. MORGEN, Vice Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Ernest Gilliam Jr. was present and was represented by Christopher Coker, Attorney at Law, of Parr and Younglove, P.L.L.C. Anne O. Shaw, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, inefficiency, gross misconduct and willful violation of published agency policy. Respondent alleges that Appellant exposed his bare buttocks to coworkers; verbally threatened coworkers who

1 may have reported the incidents; placed his hands on coworkers' hips from behind and thrust his
2 groin against their buttocks in a sexual manner; and made inappropriate comments with sexual
3 connotations to coworkers regarding their clothing and body composition.

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5 1.4 Citations Discussed. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084
6 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Anane v.
7 Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston
8 Co. Super. Ct. Jan. 10, 1997); Rainwater v. School for the Deaf, PAB No. D89-004 (1989);
9 Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Holladay v. Dep't of
10 Veterans Affairs, PAB No. D91-084 (1992).

11 12 **II. FINDINGS OF FACT**

13 2.1 Appellant Ernest Gilliam Jr. was a Laundry Worker 1 and permanent employee for
14 Respondent Department of Social and Health Services at Western State Hospital. Appellant and
15 Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder,
16 Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on
17 January 30, 2001.

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19 2.2 By letter dated January 26, 2001, C. Jan Gregg, Chief Executive Officer of Western State
20 Hospital, informed Appellant of his dismissal effective February 13, 2001. Ms. Gregg charged
21 Appellant with neglect of duty, inefficiency, gross misconduct and willful violation of published
22 agency rules or regulations. Ms. Gregg specifically alleged that Appellant exposed his bare
23 buttocks to coworkers in the laundry; verbally threatened coworkers who may have reported the
24 incidents; placed his hands on coworkers' hips from behind and thrust his groin against their
25 buttocks in a sexual manner; and made inappropriate comments with sexual connotations to
26 coworkers regarding their clothing and body composition.

1 2.3 Appellant began his employment in the Laundry Department at Western State Hospital in
2 December 1993 as a Laundry Worker 1. In November 1999, Appellant was promoted to a
3 temporary Acting Laundry Worker 2 position. As a Laundry Worker 2, Appellant had supervisory
4 authority over other Laundry Worker 1 employees. Appellant has no history of disciplinary or
5 corrective actions.

6
7 2.4 Appellant worked with Floyd Bishop, Jamie Detert, Marilyn Hall and Virginia Sigafoos.
8 Shortly after beginning his employment in the Laundry, Appellant began to pull down his trousers
9 in front of his male coworkers. Appellant's actions were intended to be and were perceived by his
10 coworkers to be joking in nature. At times, Appellant exposed only his underwear, but on some
11 occasions he exposed his bare buttocks. Jerry Kellum, Laundry Worker 2, was also present when
12 Appellant pulled his pants down in front of others.

13
14 2.5 With time, Appellant began to display similar behavior around his female coworkers. Mr.
15 Bishop, a Laundry Worker 1, advised Appellant that he should stop exposing his buttocks at work.
16 Mr. Bishop told Appellant that he was "getting a bit too old" for that type of horseplay, to which
17 Appellant responded, "so."

18
19 2.6 Ms. Detert, Laundry Worker 2, also witnessed Appellant pull down his pants. On numerous
20 occasions, Appellant exposed his bare buttocks to her by specifically calling out her name and
21 pulling down his pants and underwear when she looked at him. Ms. Detert spoke to Appellant and
22 told him she found his behavior "gross and disgusting," and she told him to stop. Ms. Detert also
23 reported Appellant's inappropriate behavior to their supervisor, Fred Bolar. However Appellant's
24 behavior did not cease.

1 2.7 Ms. Sigafoos, Laundry Worker 1, worked with Appellant for approximately seven years.
2 During that time frame, Appellant repeatedly exposed his buttocks to Ms. Sigafoos. Appellant also
3 grabbed Ms. Sigafoos from behind while she was bent over loading dryers, held her hips with his
4 hands and rubbed his groin against her buttocks. This occurred numerous times and on each
5 instance, Ms. Sigafoos told Appellant to stop and get away from her. On other occasions, Appellant
6 intentionally walked by Ms. Sigafoos and “bumped” her with his groin area. The last time
7 Appellant rubbed his groin against Ms. Sigafoos, he told her, “I’ve been wanting to do that for a
8 long time.” Appellant also subjected Ms. Sigafoos to comments that she found sexually offensive.
9 Whenever Ms. Sigafoos wore jeans, Appellant suggestively remarked, “those fit really nice,” and he
10 told her he liked the way they “hugged your curves.” As a result, Ms. Sigafoos stopped wearing
11 jeans to work.

12
13 2.8 When Appellant was temporarily assigned to work as a Laundry Worker 2, he had
14 supervisory responsibilities over Ms. Sigafoos. During this time period, Appellant continued to
15 expose his buttocks and to “bump” Ms. Sigafoos’ buttocks with his groin. Ms. Sigafoos continued
16 to tell Appellant to stop. Ms. Sigafoos reported Appellant’s behavior to Appellant’s supervisor, Mr.
17 Bolar, however, Appellant continued to display inappropriate behavior toward Ms. Sigafoos.
18 Appellant’s behavior had a negative impact on Ms. Sigafoos, who felt stressed, uncomfortable and
19 offended by his actions.

20
21 2.9 Marilyn Hall, Laundry Worker 1, worked with Appellant for approximately nine years.
22 Appellant also exposed his bare buttocks to Ms. Hall, untied her apron strings while standing
23 behind her, and he made comments about her jeans and told her he liked the shape of her butt. On
24 several occasions Appellant intentionally came up behind Ms. Hall while she was unloading the
25 dryer and “bumped” her buttocks with his groin. Ms. Hall repeatedly told Appellant to stop,
26 however, Appellant’s response was to laugh and walk away. Ms. Hall reported Appellant’s

1 behavior to her supervisor. In 1998, Ms. Sigafos noted that Appellant began to pull his pants
2 down and untie her apron more frequently. Ms. Sigafos was uncomfortable and felt intimidated
3 with Appellant's behavior.

4
5 2.10 On June 29, 2000, the day before a coworker's retirement, Appellant wore black lace
6 underwear under his sweatpants as a joke. Appellant called out to Ms. Detert, Mr. Bishop, Ms. Hall
7 and Ms. Sigafos, and he pulled down his sweatpants to expose the lace underwear.

8
9 2.11 Ms. Detert, frustrated with Appellant's behavior, spoke with her union representative and
10 described Appellant's behavior. Ms. Detert was told to make a formal written complaint to submit
11 to management. Ms. Sigafos also felt this was the "last straw."

12
13 2.12 On July 20, 2000, Ms. Detert, Mr. Bishop, Ms. Hall and Ms. Sigafos submitted a written
14 complaint to the Assistant Chief Executive Officer of Western State Hospital, in which they wrote:

15
16 We, the employees signed below, have been witness to, on several different,
17 occasions, Ernie Gilliam (temp LW2), exposing his bare buttocks in the laundry.
18 Ernie considered this to be a joke, however, several of the employees found this
19 to be very offensive and inappropriate in the workplace.

20
21 2.13 On July 20 the department held an employee grievance hearing related to Mr. Bolar, who
22 was Appellant's supervisor. At approximately 3 p.m. Ms. Detert and Mr. Bishop were taking a
23 break outside when Appellant approached them and angrily told them words to the effect of, "It's
24 on!" or "Okay. It's going on now!" Both Ms. Detert and Mr. Bishop believed that Appellant was
25 threatening them based on his close proximity to them and his visibly angry demeanor and red face.
26 Ms. Detert and Mr. Bolar immediately submitted a written complaint to the personnel office.

1 2.14 Following receipt of the complaints, the department contacted the Washington State Patrol
2 and requested an administrative investigation. During an interview with Washington State Patrol
3 (WSP) Sergeant Jeff DeVere, Appellant stated between 1994 and 1998, he partially exposed his
4 buttocks to laundry employees on approximately five occasions by lowering his shorts four inches
5 and exposing his upper right buttock cheek. Appellant stated he never exposed his entire buttock.
6 Appellant stated that he exposed himself in a joking manner, that his behavior was normal activity
7 for the laundry workers and that he was never told he offended anyone. Appellant denied wearing
8 black lace underwear and he further denied exposing himself on June 29, 2000. Appellant admitted
9 making the comment, "it's on now," but told Sergeant DeVere that he made the comment solely to
10 Mr. Bishop, whom he supervised, in reference to not allowing Mr. Bishop to take extended breaks.
11 Appellant denied that he intended the comment as a threat toward Mr. Bishop.

12
13 2.15 On November 21, 2000, Sergeant DeVere forwarded the results of his investigation to Chief
14 Executive Officer C. Jan Gregg. After reviewing the report, Ms. Gregg concluded that Appellant
15 engaged in misconduct and that disciplinary action was warranted. To determine the appropriate
16 level of discipline, Ms. Greg reviewed Appellant's work history and she arranged to meet with
17 Appellant on January 3, 2001. Appellant chose not to attend the meeting, however, he submitted a
18 written response, which Ms. Greg reviewed.

19
20 2.16 Ms. Gregg concluded that Appellant neglected his duty when he acted in an unprofessional
21 manner in the workplace and when he created a hostile work environment for his coworkers. Ms.
22 Gregg believed that Appellant's behavior rose to the level of gross misconduct when he lowered his
23 pants to show his buttocks to coworkers and when he grabbed Ms. Sigafos and Ms. Hall by their
24 waists and rubbed his groin against them in a sexual manner. Ms. Gregg concluded that
25 Appellant's behavior was disruptive and created an inefficient work environment because he
26 distracted others from performing their jobs duties.

1
2 2.17 Ms. Gregg believed that Appellant lacked integrity and created a negative work
3 environment. Ms. Gregg concluded that Appellant neglected his duty and violated agency policies
4 when he failed to maintain personal conduct within accepted standards of behavior; when he
5 engaged in both verbal and physical sexual misconduct; and when he made workplace threats which
6 amounted to violence in the workplace. Ms. Greg saw nothing in Appellant's written statement to
7 contradict the information found in the WSP investigation, and she believed that Appellant's
8 behavior was serious enough to warrant termination.

9
10 2.18 Western State Hospital has adopted Policy 3.1.1 and Administrative Policy 6.04 that require
11 employees to demonstrate the highest standards of personal integrity and to interact with coworkers
12 with respect, concern, courtesy and responsiveness. Administrative Policy 6.04, which addresses
13 Standards of Ethical Conduct for Employees, also requires employees to create a work environment
14 free from sexual/workplace harassment, intimidation, retaliation, hostility or unreasonable
15 interference with an individual's work performance. Policy 3.1.8 defines sexual harassment, in
16 part, as "conduct that has the purpose or effect of unreasonably interfering with an individual's
17 work performance or creating an intimidating, hostile or offensive working environment. Appellant
18 was aware of the agency's policies, and he attended Sexual Harassment training on March 25, 1997.

19
20 2.19 Respondent has adopted Policy 3.4.10 that defines workplace violence as "any physical
21 assault, attempt to physically assault, verbal threat to assault, threat of, or actual damage to personal
22 property of another, harassment, or placing another person in substantial fear of such actions." The
23 policy further states that a threat must be 1) communicated, 2) convey intent to do harm, and 3)
24 come from a person who is able to carry out the threat. After reviewing the testimony of Ms. Detert
25 and Mr. Bishop, we do not find that a preponderance of the evidences establishes that the comment
26 made to them by Appellant rises to the level of a threat as defined by Respondent's policy.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that there is sufficient credible evidence that Appellant exposed part or all of his buttocks to coworkers, grabbed two females and rubbed his groin to their buttocks, and made sexually suggestive remarks to them. Respondent argues that whether Appellant was acting in a joking manner is irrelevant because his actions were intentional and not appropriate in the workplace. Respondent argues that the nature of Appellant's actions created a hostile work environment for others. Respondent further argues that Appellant threatened two employees who were clear that his comment was meant as a threat. Respondent argues that both Mr. Bishop and Ms. Detert perceived Appellant's comment as a physical threat that would have escalated had Mr. Bishop responded. Respondent argues that Appellant's capacity in a supervisory role only exacerbated the situation. Respondent argues that Appellant's actions were egregious and that the appointing authority terminated Appellant to stop his conduct and to deter others from similar behavior. Respondent asks that the dismissal be affirmed.

3.2 Appellant argues that the complainants waited an unreasonable and unexplained length of time to report his behavior. Appellant asserts that as a result, the stories of his behavior were exaggerated as time went on. Appellant denies that he issued Mr. Bishop a threat when he told him "It's on" and he asserts his comment was intended to mean that he was going to "crack down" on long breaks Mr. Bishop was taking. Appellant asserts that his innocuous statement was in no way a threat. Appellant contends that the environment in the Laundry consisted of gossip, exaggerations and sexual talk by other employees. Appellant asserts that no discipline was warranted and that the sanction imposed was much too severe.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.4 Inefficiency is the utilization of time and resources in an unproductive manner, the ineffective use of time and resources, the wasteful use of time, energy, or materials, or the lack of effective operations as measured by a comparison of production with use of resources, using some objective criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

4.5 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

4.6 Willful violation of published employing agency or institution or Personnel Resources Board rules or regulations is established by facts showing the existence and publication of the rules

1 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
2 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

3
4 4.7 Respondent has met its burden in proving by a preponderance of the evidence that Appellant
5 engaged in inappropriate behavior in the workplace which included pulling down his pants to
6 partially and/or fully expose his buttocks to both male and female coworkers. Respondent has also
7 proven that Appellant grabbed Ms. Sigafos and Ms. Hall by the hips while standing behind them
8 and rubbed his groin area to their buttocks and made inappropriate sexually suggestive comments to
9 them about how they appeared in their jeans.

10
11 4.8 There is little dispute here that Appellant's conduct was unwelcome by Ms. Detert, Ms.
12 Sigafos and Ms. Hall. These employees repeatedly told Appellant to stop his behavior. Although
13 Appellant felt that his actions were joking in nature, Ms. Deter, Ms. Sigafos and Ms. Hall found
14 his behavior personally offensive. Appellant's misconduct created an intimidating, hostile and
15 offensive work environment for them.

16
17 4.9 Respondent has met its burden of proving that Appellant neglected his duty to treat his
18 coworkers with dignity and respect and his actions were a willful violation of the agency's policies.
19 Appellant's misconduct was a wasteful use of his time and his coworkers' time and constitutes
20 inefficiency. Appellant's behavior rises to the level of gross misconduct because he interfered with
21 the with the department's ability to ensure that its employees were protected from any form of
22 sexual harassment in the workplace.

23
24 4.10 Respondent has failed to meet its burden of proving by a preponderance of the evidence that
25 Appellant's comment, "It's on," constituted a threat or that he violated the agency's policy against
26 violence in the workplace.

1 4.11 In determining whether a sanction imposed is appropriate, consideration must be given to
2 the facts and circumstances, including the seriousness and circumstances of the offenses. The
3 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
4 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
5 program. An action does not necessarily fail if one cause is not sustained unless the entire action
6 depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

7
8 4.12 In deciding whether the sanction of dismissal is warranted here, we note that Appellant was
9 repeatedly told by his coworkers to stop his behavior, however, he continued to engage in a pattern
10 of inappropriate behavior in the workplace. Furthermore, Appellant was acting in a supervisory
11 capacity for part of the time that he engaged in the misconduct. Under the facts and circumstances
12 of this case, including the seriousness of the offenses and the repeated pattern of Appellant's
13 misconduct, we conclude that Respondent has proven that the sanction of dismissal is appropriate,
14 and the appeal should be denied.

15
16 **V. ORDER**

17 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Ernest Gilliam Jr. is denied.

18
19 DATED this _____ day of _____, 2002.

20 WASHINGTON STATE PERSONNEL APPEALS BOARD

21
22 _____
23 Walter T. Hubbard, Chair

24
25 _____
26 René Ewing, Member